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NO. 91-278

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

THE ESTATE OF DAU VAN TRAN,
VI THI PHAM and DO VAN TRAN,
Petitioners,

v.

TEXACO REFINING AND MARKETING INC.
and
TEXACO MARINE SERVICES INC.,
Respondents.

**RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

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QUESTIONS PRESENTED FOR REVIEW

Pursuant to Rule 24.2, *Supreme Court Rules*, Respondent Texaco adopts the Questions as stated by Petitioners.

II

**CERTIFICATE OF INTERESTED PARTIES
AND PARTIES BELOW**

Respondent Texaco adopts the Certificate of Interested Parties as set out by Petitioners.

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OPINION SOUGHT TO BE REVIEWED

Respondent Texaco adopts the statement of Petitioners concerning the Opinion Sought To Be Reviewed. Texaco also adopts the verbatim reproduction of that Opinion contained in Appendix A of the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

Respondent Texaco adopts the factual allegations set forth in Petitioners' Statement of Jurisdiction. For reasons set forth hereinafter, Texaco disagrees with Petitioners' assertion that this Court has jurisdiction to review these matters pursuant to 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED IN THE CASE

Texaco adopts Respondents' statements concerning the statutory provisions involved in the case, and adopts the verbatim reproduction of those provisions contained in the Petition for Writ of Certiorari.



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STATEMENT OF THE CASE

Dau Van Tran died on September 16, 1985, alongside the Sabine River at Port Arthur, Texas. Tran was climbing out of the water at dockside, apparently after trying to remove an obstruction from a shrimpboat's propeller, when a wave allegedly generated by a passing ship pushed the shrimpboat against the dock. Tran was crushed between the boat and the dock.

Tran's estate and his parents (hereinafter collectively "Tran") filed suit in Texas state court against several defendants, among them the Texaco entities that owned

and operated the ocean-going tanker TEXACO CALIFORNIA that allegedly caused the wave. After a bench trial, the court found Texaco liable for negligently operating the vessel. The court awarded damages of \$1,324,849.55, which included compensation for the parents' loss of financial support, for the loss of their son's society and for their mental anguish.

The protracted appellate process¹ has focused on the elements of damage. Texaco has contended that the claims against it arise under general maritime law, that general maritime law pre-empts state law, and that under general maritime law, the parents cannot recover damages either for mental anguish or for loss of their son's society. Tran, on the other hand, has maintained that because the death occurred in territorial waters, state law and state remedies apply.

Ultimately, the Texas Supreme Court agreed with Texaco. In an opinion styled *Texaco Refining and Marketing, Inc. v. Estate of Tran*, 808 S.W.2d 61 (Tex. 1991), the Texas Supreme Court directed that the damages awarded for mental anguish and for loss of society be stricken because those damages are not recoverable under the general maritime law's wrongful-death action. Tran seeks review of that order.

1. The Texas appellate court initially affirmed the trial court's judgment. *Texaco Refining & Marketing, Inc. v. Estate of Tran*, 777 S.W.2d 783 (Tex. App.—Beaumont 1989). After the Texas Supreme Court denied a writ of error, thus refusing discretionary review, this Court granted certiorari, _____ U.S. ____, 110 S. Ct. 3266, 111 L.Ed 2d 776 (1990), vacated the judgment and remanded to the appellate court for reconsideration. The appellate court reaffirmed its prior ruling. *Texaco Refining & Marketing, Inc. v. Estate of Tran*, 795 S.W.2d 870 (Tex. App.—Beaumont, 1990). This time, the Texas Supreme Court granted review, and it reversed.

SUMMARY OF ARGUMENT —

Tran raises two colorable arguments. First, he contends that when death occurs in state territorial waters, state wrongful-death remedies apply either exclusively or concurrently at the option of the plaintiff. That argument ignores history. At one time, state wrongful-death laws had indeed applied in territorial waters because the general maritime law did not provide a right of action for wrongful death. However, in *Moragne v. States Marine Lines, Ltd.*, 398 U.S. 375, 90 S. Ct. 1772, 26 L.Ed.2d 339 (1970), this Court judicially created a federal cause of action under the general maritime law for wrongful deaths occurring in state territorial waters. Because *Moragne* plugged the gap that state law had previously filled, it thereby eliminated any need to apply state law to maritime cases. Every Circuit Court of Appeals to consider the question has agreed that since *Moragne*, the general maritime law of wrongful death pre-empts state statutes. *Nelson v. United States*, 639 F.2d 469 (9th Cir. 1980), *Matter of S/S HELENA*, 529 F.2d 744 (5th Cir. 1976), *Petition of United States Steel Corp.*, 436 F.2d 1256, 1279 (6th Cir. 1970), *cert. denied*, 402 U.S. 287, *reh'g denied*, 403 U.S. 924, 403 U.S. 940 (1971).

Tran concedes that if maritime law pre-empts state law, the award for mental anguish must be stricken. This Court squarely declared in *Sea-Land Services v. Gaudet*, 414 U.S. 573, 94 S. Ct. 806, 39 L.Ed.2d 9 (1974) that mental-anguish damages are not recoverable in a maritime wrongful-death action, and Tran does not argue to the contrary.

Tran's second argument is independent of the choice-of-law question. While our case was in the appellate

process, this Court decided in *Miles v. Apex Marine*, ____U.S.____, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990) that in order to promote uniformity, survivors may not recover loss-of-society damages in a seaman's general maritime action for wrongful death because loss-of-society damages are unavailable in a seaman's statutory action for wrongful death. The Texas Supreme Court extended the reasoning of *Miles* to the facts of our case and deleted the loss-of-society damages. Tran disputes Texaco's interpretation of *Miles*, and asks that even if maritime law is found applicable, this Court restore the award for loss of society.

Texaco will show that the Texas Supreme Court was correct. This case is governed by general maritime law. Neither mental-anguish nor loss-of-society damages are recoverable. Texaco therefore respectfully requests this Court to deny the petition for a writ of certiorari.

ARGUMENT

A. The Matters At Issue Do Not Warrant Exercise Of This Court's Writ of Certiorari Jurisdiction Even If The Texas Supreme Court's Decision Is Wrong.

The most important reason why this Court should not grant certiorari is that the Texas Supreme Court's decision is correct, and should therefore be left undisturbed. The bulk of this response discusses the merits of the decision. As a prefatory matter, though, Texaco would point out that even if the Texas Supreme Court's decision is wrong in whole or in part, this is still not a compelling case for review by grant of certiorari.

The Texas Supreme Court's ruling that federal maritime law pre-empts state law is not a decision that this

Court needs to review. If the pre-emption decision is not *compelled* by federal law, then the effect of the Texas Supreme Court's decision is to adopt federal maritime law as surrogate state law. That decision is certainly *permissible*, and is not a matter requiring this Court's review. Thus, if the Texas Supreme Court is correct, then the federal interest is vindicated. If the Texas Supreme Court is incorrect, however, the federal interest is not harmed.

The Texas Supreme Court also ruled that loss-of-society damages may not be recovered under general maritime law. Ironically, if Tran's argument that maritime law does not pre-empt state law were correct, then this portion of the Texas ruling would be unreviewable, because the decision would constitute nothing more than a state-law ruling. If maritime law does pre-empt state law, as Texaco argues, then this portion of the ruling does indeed raise a federal question. However, as this Court observed in the *Moragne* case, the precise contours of the general maritime wrongful-death action need not be specified by this Court all at once, but are amenable to the "sifting" process of lower-court litigation. *Moragne v. States Marine Lines*, 398 U.S. 375, 408, 90 S. Ct. 1772, 1792, 26 L.Ed.2d 339 (1970). While the issue is potentially important, this Court need not intervene until a substantial body of lower-court opinion develops.

The three procedural rulings about which Tran complains are patently unreviewable because all lie outside this Court's jurisdiction. Two of the complaints are that the Texas Supreme Court incorrectly applied Texas procedural rules, yet there is no suggestion that the alleged errors deprived Tran of federal rights. The final complaint is that Texaco erred in appealing to the Texas Supreme

Court. Tran asserts that Texaco should have bypassed the state supreme court and appealed directly to this Court. If that rather bizarre assertion were somehow correct, then Tran would be contending, in essence, that the Texas Supreme Court improperly exercised its own jurisdiction when it reviewed the case. Again, that would be a matter of purely state law, and would fall outside this Court's jurisdiction.

B. Although Tran Died In Territorial Waters, The Federal General Maritime Law Applies Rather Than The Texas Wrongful Death Act.

In the first two questions presented for review,² Tran argues that despite the availability of a general maritime law remedy for wrongful death, state law still applies when the death occurs in territorial waters. Tran asserts that because state law applies, he is entitled to all the elements of damage permitted under the Texas Wrongful Death Act, including compensation for the survivors' mental anguish. The Texas Supreme Court disagreed.

2. Tran states the question as follows:

1. When an action for wrongful death is brought in the state court arising out of the death of a person in state territorial waters who is not a seaman, longshoreman or member of a crew of a vessel, but is a mere volunteer killed on a dock by the wave of a passing vessel, does the state wrongful death and the state survival statute apply with respect to the awarding of damages permitted by state law or does federal general maritime law pre-empt state law under such circumstances?

2. In a state court proceeding to recover for death of the person in state territorial waters who is not a seaman, longshoreman or member of a crew of a vessel, but is a mere volunteer killed on a dock in state territorial waters, may there be recovery for mental anguish by his survivors under the Texas wrongful death statute and the Texas survival statute?

To understand why the Texas Supreme Court's holding is correct, it is necessary to examine the development of a remedy for a death occurring in state territorial waters.

1. State wrongful-death statutes were imported into maritime law to fill a vacuum.

The seeds of the present problem were sown in *The Harrisburg*, 119 U.S. 199, 7 S. Ct. 140, 30 L.Ed. 358 (1886). There, this Court held that an action for wrongful death was purely statutory, and that because no federal statute addressed maritime wrongful death, the federal general maritime law did not provide a wrongful-death remedy. This holding meant that one who was merely injured in a maritime casualty could recover under the judge-made general maritime law, but one who died had no remedy.

Although the holding in *The Harrisburg* may have been "compelled" by precedent, no one thought the outcome was fair. This Court tried to ameliorate that outcome in *The Hamilton*, 207 U.S. 398, 28 S. Ct. 133, 52 L.Ed. 264 (1907), by holding that a maritime wrongful-death claimant could recover under state wrongful death laws if those laws purported to reach the maritime situs of the death.

Congress made its contribution in 1920 when it enacted two statutes. The Jones Act, 46 U.S.C. § 688, gave seamen a wrongful-death remedy against their employers when death resulted from negligence irrespective of the *situs* of the death. The Death on the High Seas Act, (DOHSA), 46 U.S.C. § 761 *et seq.*, provided a remedy to anyone killed outside a state's territorial waters. Congress did not extend DOHSA's substantive provisions to state territorial waters. Instead, Congress incorporated

The Hamilton by preserving state remedies in territorial waters. 46 U.S.C. § 767.

Those legislative and judicial actions created an unsatisfactory patchwork of wrongful-death remedies. A seaman had his Jones Act remedy for death caused by negligence (but not by unseaworthiness) no matter where the death occurred. Anyone killed outside state territorial waters had a remedy under the Death on the High Seas Act. Non-seamen killed in state territorial waters had their state-law remedies under *The Hamilton*.

2. Outside of the wrongful-death context, this Court strove for uniformity and federal primacy in maritime matters.

The importation of state wrongful-death law into maritime jurisprudence in *The Hamilton* stood in marked contrast to an important line of cases that limited state power over maritime matters, and instead stressed uniformity and federal supremacy.

In the seminal case of *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S. Ct. 524, 61 L.Ed. 1086 (1917), this Court held that New York's worker's compensation statute could not be applied to the death of a longshoreman. The Court said that the provisions of the New York statute requiring insurance, creating liability without fault and basing compensation on loss of earning power served to "work material prejudice to the characteristic features of the general maritime law" and to interfere "with the proper harmony and uniformity of that law in its international and interstate relations." *Id.* at 216, 37 S. Ct. at 529, 61 L.Ed. 1086.

In *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 38 S. Ct. 501, 62 L.Ed. 1171 (1917), this Court held that a claimant was restricted to his maritime-law remedies rather than his more generous state-law remedies even when he brought suit in state court.

In *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 40 S. Ct. 438, 64 L.Ed. 834 (1920), this Court invalidated a Congressional act that awarded waterfront workers their rights and remedies under state worker's compensation laws. This Court held that the statute impermissibly delegated Congress's exclusive authority to prescribe maritime rights and remedies. *Id.* at 164, 40 S. Ct. at 441, 64 L.Ed. 834. In so holding, this Court read the Constitutional extension of federal judicial power to "all cases of admiralty and maritime jurisdiction," U.S. Const. art. III, § 2, as a mandate to establish "harmonious and uniform rules applicable throughout every part of the Union." *Knickerbocker Ice Co.*, *id.* at 164, 40 S. Ct. at 441, 64 L.Ed. 834.

3. The use of state wrongful-death statutes collided with the principle of uniformity.

This Court was always aware that the reference to state laws of wrongful death was contrary to the general drive towards uniformity and federal primacy in maritime law. In the uniformity decisions, the Court noted that the importation of state wrongful-death law was an anomaly. See *Southern Pacific Co. v. Jensen*, *supra*, 244 U.S. at 216, 37 S. Ct. at 529, 61 L.Ed. 1086; *Knickerbocker Ice Co. v. Stewart*, *supra*, 253 U.S. at 166, 40 S. Ct. at 442, 64 L.Ed. 834. For a time, though, the anomaly was tolerable.

New cases exacerbated the tension between the general principles of maritime uniformity and federal supremacy on the one hand and the anomalous system of looking to state law as the remedy for maritime wrongful death on the other hand. Suppose, for example, that a claim arose from a breach of the judge-made maritime warranty of seaworthiness. If the victim was injured, he had a claim under the judge-made general maritime law. If the victim died, though, he had to look to state law under *The Hamilton*. Did this mean that recovery for death caused by unseaworthiness depended upon whether the state wrongful-death statute encompassed the maritime concept of unseaworthiness?

In *The Tungus v. Skovgaard*, 358 U.S. 588, 79 S. Ct. 503, 31 L.Ed.2d 524 (1959), this Court answered that question "Yes," and declared that when a maritime wrongful-death claimant invoked state law, he had to accept that law as it was, complete with any limitations that might render state law unsuitable for a maritime claimant. The case not only illuminated the fact that state law still left gaps where no recovery was possible, but also underscored again the fact that reliance on state law was antithetical to uniformity and federal primacy.

4. This Court resolved the dilemma by creating a general maritime law wrongful-death action.

In 1970, this Court revisited the entire problem in *Moragne v. States Marine Lines, Ltd.*, 398 U.S. 375, 90 S. Ct. 1772, 26 L.Ed.2d 339 (1970). After reviewing the unsatisfactory judicial and congressional efforts to deal with wrongful deaths in territorial waters, this Court concluded that the root of the problem was its holding

in *The Harrisburg* that wrongful-death actions could not be maintained absent a statute. This Court overruled *The Harrisburg*, and created a new federal common-law cause of action for wrongful death in territorial waters. In so doing, the Court again stressed the importance of uniformity, saying:

Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. [Citations omitted]. Such uniformity not only will further the concerns of both of the 1920 Acts but also will give effect to the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.'

Moragne, 398 U.S. at 401-02, 90 S. Ct. at 1788, 26 L.Ed.2d 339.

The question *Moragne* did not *explicitly* answer, and which this case squarely poses, is whether that judicially created federal cause of action is the *exclusive* remedy for wrongful death in state territorial waters, or whether state wrongful-death statutes still have a role to play.

5. The circuits have agreed that the *Moragne* cause of action pre-empts state law.

The Circuit Courts of Appeals quickly and unanimously concluded that after *Moragne*, the general maritime law was the exclusive remedy for wrongful death occurring in territorial waters. In *Petition of United States Steel Corp.*, 436 F.2d 1256 (6th Cir. 1970), *cert. denied*, 402 U.S. 287, *reh'g denied* 403 U.S. 924, 403 U.S. 940 (1971),

the issue was exactly the same as the issue in this case, namely, whether wrongful-death survivors could recover state-sanctioned damages when those damages were more generous than the damages available under the general maritime law. The court ruled that after *Moragne*, the answer was "No." The court said:

Recognition of a right of recovery for wrongful death under the general maritime law [in *Moragne*] strongly dictates that in order to promote the uniformity and supremacy of the maritime law [citations omitted], the measure of recovery must be governed by principles of that law where, as here, there is a conflict between the damages recoverable under the general maritime law [citations omitted] and those recoverable under state law.

Id. at 1278.

In *Matter of S/S Helena*, 529 F.2d 744 (5th Cir. 1976), the Fifth Circuit considered whether wrongful-death survivors could recover damages for mental anguish, which state law permitted but which the general maritime law disallowed. *Sea-Land Services v. Gaudet*, 414 U.S. 573, 94 S. Ct. 806, 39 L.Ed.2d 9 (1974). After an extensive review of this Court's pre-*Moragne* holdings, Judge Wisdom concluded:

Because a persuasive rationale for the enforcement of state wrongful death statutes in admiralty courts no longer exists after *Moragne*, we hold that the wrongful death remedy provided by that case precludes recognition in admiralty of state statutes.

Id. at 753. Having so said, the court ordered deletion of any elements of damage that could not be recovered under the general maritime law.

In *Nelson v. United States*, 639 F.2d 469 (9th Cir. 1980), the question was whether *Moragne* ousted state wrongful-death statutes altogether, or whether it merely created a federal common-law remedy for deaths due to unseaworthiness, leaving state law and remedies to govern deaths due to negligence. Basing the decision on the importance of maritime uniformity, Judge (now Justice) Kennedy wrote:

We hold that the need for uniformity in maritime wrongful death actions requires extension of *Moragne* to cover claims based on negligence, to the exclusion of state wrongful death statutes.

Id. at 473.

Texaco cannot improve on the reasoning of those three cases, and will not try. Suffice it to say that the case for pre-emption of state law by general maritime law is solidly grounded in sound historical and policy considerations.

C. Petitioners' Arguments Against Pre-emption Of State Law Are Erroneous.

Tran makes four arguments against pre-emptive application of general maritime law. As Texaco will show, none of those arguments has merit.

1. **Tran relies on pre-*Moragne* law and on one post-*Moragne* case describing pre-*Moragne* law, all of which beg the question of whether the *Moragne* remedy is pre-emptive.**

Tran cites numerous cases stating that when wrongful death occurs in territorial waters, state wrongful-death

statutes control. With one exception, though, all of the cases cited are prior to *Moragne*, and correctly state the law at the time they were decided. Obviously, though, those cases fail to address the issues in this case, namely, the changes that *Moragne* wrought.

The lone post-*Moragne* case that Tran cites is *Offshore Logistics v. Tallentire*, 477 U.S. 207, 106 S. Ct. 2485, 91 L.Ed.2d 174 (1986). Tran quotes extensively from that case, and claims that it holds that state law applies in territorial waters. At first blush, the quoted provisions of *Tallentire*, taken out of context, do appear to support Tran. Upon further analysis, though, it becomes apparent that the cited portions of *Tallentire* do not declare post-*Moragne* law, but rather, simply describe pre-*Moragne* law. When read properly, *Tallentire* supports Texaco's position that after *Moragne*, the general maritime law controls and pre-empts state law even in territorial waters.

The issue in *Tallentire* was whether the Death on the High Seas Act (DOHSA) displaced state law on the high seas, or whether a plaintiff could supplement DOHSA remedies with state-law remedies. The claimants based their argument on Section 7 of DOHSA, 46 U.S.C. § 767, which says, in pertinent part:

The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter.

The claimants argued that if state law would provide a wrongful-death remedy *absent* DOHSA, then Section 7 explicitly preserved that state remedy *despite* DOHSA.

This Court disagreed. After observing that the language of Section 7 bears "a marked similarity to the 'savings

to suitors' clause that allows litigants to bring *in personam* maritime actions in state courts," 477 U.S. at 222, 106 S. Ct. at 2494, 91 L.Ed. 174, the Court held that Section 7 was intended to be a *jurisdictional* savings clause, guaranteeing that the litigant would have access to a state *forum*. 477 U.S. at 231-32, 106 S. Ct. at 2499, 91 L.Ed.2d 174. The Court did not confine its analysis to the text of Section 7 itself, but rather based its holding on "the language of the Act as a whole, the legislative history of § 7, the congressional purposes underlying the Act, and the importance of uniformity of admiralty law." 477 U.S. at 221, 106 S. Ct. at 2493, 91 L.Ed.2d 174.

In its discussion of the legislative history of Section 7, this Court noted that at the time DOHSA was passed, state laws were the only remedies available for wrongful deaths within territorial waters. Section 7 insured that such remedies would continue to be available. In the context of describing the situation existing at the time DOHSA was passed, this Court said:

Although not *intended* to function as a substantive law savings clause, § 7 *incidentally* insured that state courts exercising concurrent jurisdiction could, as under the 'savings to suitors' clause, apply such state remedies as were not inconsistent with substantive federal maritime law.

477 U.S. at 224, 106 S. Ct. at 2485, 91 L.Ed.2d 174 (emphasis added).

Tran's mistake lies in reading this Court's historical discussion of pre-*Moragne* law in *Tallentire* as a holding that state remedies remain available in territorial waters even after *Moragne*. In fact, *Tallentire* does not directly address that issue. *Tallentire* affirms that the critical in-

quiry is whether the application of state law is "inconsistent with substantive federal maritime law," but does not undertake to answer the question of whether there is an impermissible inconsistency between state wrongful-death law and the *Moragne* general-maritime claim.

Although *Tallentire* may not address the pre-emption question directly, it does address the question by implication, and the implicit answer favors Texaco's position. Again, in discussing the legislative history of DOHSA, this Court said:

[R]eferences [during Congressional debates] to state court jurisdiction should be read to mean only the ability of state courts to entertain maritime actions based on DOHSA, not the legislative ability to supply a different standard of recovery. As has been explained, even at the time DOHSA was being considered it was understood that where Congress had spoken, *or where general federal maritime law controlled*, the States exercising concurrent jurisdiction over maritime matters could not apply conflicting state substantive law. See *Chelentis v. Luckenbach S.S. Co.*, *supra*; *Southern Pacific Co. v. Jensen*, *supra*.

477 U.S. at 228, 106 S. Ct. at 2497, 91 L.Ed.2d 174 (emphasis added).

In that critical passage, the Court in *Tallentire* reiterated the general rule that where federal law exists, any conflicting state law must give way. The scope of that statement is revealed in the supporting cases that this Court cited. The *Jensen* case involved the application of state law in territorial waters, so the citation to *Jensen* confirms that the general principle of pre-emption applies in territorial waters as well as on the high seas. The *Che-*

lentis case involved a maritime claimant who was seeking state statutory remedies more generous than those available under maritime law, and the case stands for the proposition that more generous remedies are "conflicting state substantive law" that must give way to general maritime law. The citation to *Chelentis* reaffirms that the principles of uniformity and federal primacy apply to remedies as well as to causes of action.

Additionally, it is worth noting that the weight of authority is squarely on Texaco's side. If Tran's reading of *Tallentire* is correct, then the Fifth, Sixth and Ninth Circuits' rulings that the *Moragne* cause of action pre-empts state law are incorrect. Yet none of those courts has changed its prior decision in light of *Tallentire*. The circuits' continued adherence to their views that general maritime law pre-empts state law strongly supports Texaco's interpretation of *Tallentire*.

2. The argument that *Moragne* applies to unseaworthiness claims but not to negligence claims has been rejected as violating the principle of uniformity.

Petitioners argue that *Moragne* was intended only to create a remedy for death caused by unseaworthiness, thus plugging a gap created by *The Tungus*, while leaving state wrongful-death statutes applicable in negligence cases. This, of course, is precisely the argument considered and explicitly rejected in *Nelson v. United States*, 639 F.2d 469 (9th Cir. 1980). The argument was implicitly rejected by the Fifth Circuit as well in *Hornsby v. Fish Meal Co.*, 431 F.2d 865 (5th Cir. 1970) and *Dennis v. Central Gulf Steamship Corp.*, 453 F.2d 137

(5th Cir. 1972), which are post-*Moragne* negligence cases in which the new general maritime wrongful-death law was applied rather than state wrongful-death law.

3. The argument that *Moragne* applies only to seamen is incorrect, because the general maritime law applies principally to non-seamen.

Tran tries to distinguish the Circuit Court cases *Texaco* cites on the basis that those cases involved seamen. Tran suggests that while the federal government may have a sufficient interest in the welfare of seamen to pre-empt state law, as exemplified by the Jones Act, there is no correspondingly strong federal interest in a non-seaman such as Tran.

This argument misconceives the interplay of maritime remedies. Although the Jones Act may not be exclusive, it remains the seaman's principal remedy. Conversely, the general maritime law was developed principally to protect non-seamen, who were not covered by the Jones Act.

In arguing that any *Moragne* pre-emption applies only to Jones Act seamen, or to seamen in general, Tran is attempting to extract a rule of law from a series of coincidences. Although the decedents in *United States Steel, S/S HELENA* and *Nelson* may arguably have been seamen, none of the suits was brought under the Jones Act. An abundance of other cases have applied the *Moragne* remedy to non-seamen—indeed, *Moragne* himself was a longshoreman. See also, e.g., *Hornsby v. Fish Meal Co.*, 431 F.2d 865 (5th Cir. 1970) (airplane-pilot plaintiff); *Dennis v. Central Gulf Steamship Corp.*, 453 F.2d 137 (5th Cir. 1972) (marine-surveyor plaintiff).

Moreover, the argument appears to assume that federal concern for admiralty and maritime matters arises solely from the desire to protect certain classes of potential victims. In fact, laws exist not only to provide remedies but also to regulate conduct. In our case, the federal concern over admiralty and maritime matters surely embraces the manner in which shipowners like Texaco operate vessels on navigable waterways. That concern is independent of the status of the victim, and can best be vindicated if laws and rules regulating conduct likewise apply uniformly irrespective of the status of the victim.

4. Contrary to petitioners' argument, the Admiralty Extension Act has nothing to do with the question of pre-emption.

Finally, Tran reads the Texas Supreme Court's opinion as holding that the Admiralty Extension Act, 46 U.S.C. § 740, pre-empts state law, and argues that such a holding is error. That argument misconstrues the issue and the Texas Supreme Court's decision.

The Admiralty Extension Act extends admiralty and maritime jurisdiction to injuries caused by vessels on navigable waterways even if the "damage or injury be done or consummated on land." During the appellate process, Tran had argued that this was not a maritime case because the death occurred at a dock, an extension of land. Texaco replied that under the Admiralty Extension Act, the matter would still fall within admiralty and maritime jurisdiction because the alleged cause of the damage was Texaco's operation of an ocean-going vessel on navigable waters. No one argued that the Admiralty Extension Act itself pre-empts state law. Rather, the Admiralty Extension Act makes substantive general mari-

time law applicable, and that substantive general maritime law pre-empts state law.

Tran's misunderstanding is illustrated by his citation to *Askew v. American Waterways Operators Ass'n*, 411 U.S. 325, 93 S. Ct. 1590, 36 L.Ed.2d 280 (1973). The question in that case was whether state pollution laws could operate in territorial waters in light of the federal Water Quality Improvement Act, 33 U.S.C. § 1161 *et seq.* Because the federal act specifically stated that it did *not* pre-empt state law, 33 U.S.C. § 1161(o), the Court examined the two statutory schemes to determine whether in fact any fatal conflict existed. The Court determined that there was no conflict. 411 U.S. at 337, 93 S. Ct. at 1598, 36 L.Ed.2d 280.

The only remaining question, then, was whether, under the principles of uniformity and under the Admiralty Extension Act, Congress even had the power to *permit* state regulation. The Court answered that question "Yes." The Court held that the Admiralty Extension Act does not forbid all state legislation, but only state legislation that conflicts with federal law. 411 U.S. at 343, 93 S. Ct. at 1601, 36 L.Ed.2d 280.

In illustrating the principle that non-conflicting state legislation is permissible, the *Askew* Court noted that prior to *Moragne*, the provision of remedies for wrongful death in territorial waters was a non-conflicting situation. 411 U.S. at 338, 93 S. Ct. at 1598, 36 L.Ed.2d 280. That observation is not holding, it is history. In fact, the statement in *Askew* concerning state wrongful-death laws was a quote from the pre-*Moragne* case of *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373, 79 S. Ct. 468, 480, 3 L.Ed.2d 368 (1959).

This argument, then, begs the critical questions. The Admiralty Extension Act has no inherent pre-emptive power, but may call into play federal substantive maritime law, which pre-empts some but not all state laws. The question in our case still remains: Does the federal general-maritime wrongful death law conflict with and therefore pre-empt state wrongful-death laws? On that score, *Askew* is not helpful. While *Askew* did note that state wrongful-death remedies did not conflict with federal law prior to *Moragne*, that statement says nothing about how *Moragne* may have changed the situation.

For the foregoing reasons, the Texas Supreme Court correctly determined that federal general maritime law provides the exclusive remedy in this case. There is no dispute that under federal general maritime law, Tran's parents cannot recover for their mental anguish. Therefore, the Texas Supreme Court correctly determined that the portion of the damage award intended to compensate Tran's parents for their mental anguish must be stricken.

**D. The Texas Supreme Court Correctly Extended
The Holding Of *Miles v. Apex Marine* To Ban
Recovery Of Damages For Loss Of Society.**

The third question Tran presents for review is whether the plaintiff-survivors in a general maritime death action may recover damages for loss of society of the decedent.³ At Texaco's urging, the Texas Supreme Court held that such damages are not recoverable in light of this Court's

3. Tran states the question as follows:

3. Under general maritime law, where death occurs to a person in state territorial waters who is not a seaman, longshoreman or member of a crew of a vessel, but is a mere volunteer killed on a dock by the wave of a passing vessel, may his survivors recover for loss of society?

decision last term in *Miles v. Apex Marine*, ____U.S. ____, 111 S. Ct. 317, 112 L.Ed.2d 275 (1990).

In *Miles*, this Court held that a seaman killed in territorial waters by vessel unseaworthiness has a cause of action for wrongful death under the general maritime law. The Court then considered damages in such a case. The Court noted that had the death been caused by negligence, the Jones Act, *supra*, 46 U.S.C. § 688, would have applied. Had the death occurred outside of state territorial waters, the Death on the High Seas Act (DOHSA), 46 U.S.C. § 761 *et seq.*, would have applied. Both statutes specifically permit recovery only of pecuniary losses, and implicitly forbid recovery of any other items of damage. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S. Ct. 2010, 56 L.Ed.2d 581 (1978).

The Court then noted the desirability of uniformity, and, conversely, the undesirability of making the elements of recoverable damage depend upon such fortuities as the place of the accident or the theory of recovery. Because the Court had to respect the implicit prohibition of non-pecuniary damages in the Jones Act and DOHSA, the Court reasoned that uniformity could be achieved only by incorporating the prohibition against non-pecuniary damages into the general maritime cause of action.

Tran was not a seaman, so *Miles* does not squarely control. However, the reasoning in *Miles* applies equally to this case, and compels the conclusion that loss of society is not recoverable here.

The *Miles* Court reasoned that a seaman's recovery should not depend upon the situs of the death, which, in turn, determines whether DOHSA applies. Yet DOHSA

applies on the high seas to both seamen and non-seamen. If it is anomalous to make the remedies available to a *seaman's* survivors depend on the place of death, it is equally anomalous to make the remedies available to a *non-seaman's* survivors depend on that same accident of geography. And if uniformity is to be achieved, then the survivors of non-seamen killed in territorial waters must be limited to those damages they could have recovered under DOHSA had death occurred on the high seas.

Similarly, a Jones Act seaman's survivors may recover only pecuniary losses. Tran argues that because the Jones Act is inapplicable, the survivors here should recover non-pecuniary losses as well. But if, as *Miles* says, recovery should not depend upon the vagaries of *situs*—whether the accident occurred within or without territorial waters—then it is logical to ask whether recovery should depend upon the vagaries of *status*—whether the victim was or was not a seaman. As *Miles* suggests, maritime law can become truly uniform and rational only if those damage limitations embedded in DOHSA and the Jones Act become standard in *all* maritime wrongful-death cases.

In opposition to this argument, Tran cites cases that rely on *Sea-Land Services v. Gaudet*, 414 U.S. 573, 94 S. Ct. 806, 39 L.Ed.2d 9 (1972), to the effect that general-maritime law wrongful-death damages exclude mental anguish but may include loss of society. However, that holding has been limited to its facts. As this Court noted in *Miles*, *Gaudet* “applies only to longshoremen.” 111 S. Ct. at 325. And as all parties acknowledge, Tran was not a longshoreman. Thus, *Gaudet* does not control, and the Texas Supreme Court was free to extend the logic of *Miles* to Tran's death and strike damages for loss of society.

E. The Final Three Questions Petitioners Present For Review Fall Outside This Court's Jurisdiction.

The last three questions that Tran presents for review require little comment. Tran asserts that the Texas Supreme Court should have required Texaco to plead the case in a different manner at trial. Further, he argues that Texaco waived the objection to loss-of-society damages by not raising the issue until after the appellate process was under way, and this Court handed down its decision in *Miles*.⁴

These two questions simply assert that the Texas Supreme Court ruled incorrectly in matters of state procedure. Tran does not contend that those alleged errors deprived him of any rights based on the constitution or laws of the United States. Thus, far from being questions worthy of this Court's review, those questions do not even fall within this Court's jurisdiction. 28 U.S.C. § 1257(a).

The final question presented for review asserts that after the Texas appellate court reaffirmed its opinion despite this Court's vacation and remand, Texaco should have

4. Tran phrases the question as follows:

4. Is a defendant in a wrongful death case, which arises out of the death of a person who is not a seaman, longshoreman or member of a crew of a vessel, occurring in state territorial waters, required to plead the applicability of general maritime law as an affirmative defense in order to invoke the general maritime law of the United States instead of the state wrongful death act and survival statute?

5. Has Respondent Texaco waived the right to object to the awarding of damages for loss of society to the survivors of a decedent in a wrongful death case by failing to raise such issues, on appeal, to the Court of Appeals for the Ninth Judicial District, the initial appellate court to which this case was appealed?

sought immediate review in this Court, rather than again seeking discretionary review from the Texas Supreme Court.⁵ That argument ignores the fact that under 28 U.S.C. § 1257(a), this Court has jurisdiction only over state-court judgments that emanate from the highest court from which a decision *might* be had. *Costarelli v. Massachusetts*, 421 U.S. 193, 195, 95 S. Ct. 1534, 1536, 44 L.Ed.2d 76 (1975). Not only *might* review have been had in the Texas Supreme Court, review was in fact had. Plainly, then, an appeal to the Texas Supreme Court was a mandatory condition to this Court's exercise of jurisdiction.

Even if Tran were correct about the proper appellate procedure, however, this alleged error would not be reviewable. If Tran were correct, the problem would be that the Texas Supreme Court reviewed a case over which it lacked *jurisdiction*. At best, all Tran has alleged is that the Texas Supreme Court might have exceeded limitations on its own discretionary authority. But again, there are no allegations that this alleged usurpation deprived Tran of any federal rights. If federal rights are not implicated, then the alleged jurisdictional problem is a purely state matter that this Court lacks jurisdiction to review.

5. Tran states the question as follows:


6. When a judgment is reversed and remanded by the United States Supreme Court to the Court of Appeals for the Ninth Supreme Judicial District for reconsideration, is the Respondent Texaco, after the judgment is again affirmed by the Court of Appeals, required to take its appeal directly to the United States Supreme Court rather than the Supreme Court of Texas, which had originally denied writ of error of and from which denial of writ of certiorari was made to the United States Supreme Court?

SUMMARY AND CONCLUSION

- The accident that killed Dau Van Tran was a maritime tort falling within federal admiralty and maritime jurisdiction. In order to assure uniformity and protect federal primacy in the maritime field, the general maritime action for wrongful death must pre-empt state wrongful-death laws even if the death occurs in state territorial waters. Damages must be determined by federal rather than state law. Under long-established law, the surviving claimants may not recover for mental anguish in a wrongful-death case. And by the reasoning of a case from last term, those survivors may not recover for their loss of society.

The Texas Supreme Court applied general maritime law. It directed that the trial court delete those damages awarded for the survivors' mental anguish and for survivors' loss of society. Those decisions were proper and correct. Texaco therefore respectfully asks this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,



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